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No. 80-1749

In the Supreme Court of the United States

October Term, 1980

FEDERAL ENERGY REGULATORY COMMISSION AND JAMES B. EDWARDS, SECRETARY OF ENERGY,
Appellants,

vs.

THE STATE OF MISSISSIPPI, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

MOTION TO AFFIRM

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TABLE OF CONTENTS

I Questions Presented 2

II Constitutional and Statutory Provisions Involved 4

III Statement 4

A. The Statutory Background 4

1. Titles I and III of PURPA 7

2. Section 210 of Title II of PURPA 9

B. The Proceedings Below 11

The Questions Are So Unsubstantial As Not to Need Further Argument 14

1. 16

2. 17

3. 21

4. 22

5. 22

Conclusion 22

MP&L Appendix "A" 1a

TABLE OF AUTHORITIES

CASES

Brown v. EPA, 521 F. 2d 827, vac., 431 U. S. 99, reinst. in part, 566 F. 2d 665 (9th Cir. 1975, 1977, 1978) 17, 18
Burnside v. Burnside, 228 Miss. 180, 86 So. 2d 333 (1956) 16
City of Boston v. Jackson, 260 U. S. 309 (1922) 13
D. C. v. Train, 521 F. 2d 971, vac., 431 U. S. 99, reinst. in part, 567 F. 2d 1091 (D. C. 1975, 1977) 17, 18
Duncan v. McCall, 139 U. S. 449 (1891) 22
FPC v. Southern California Edison Co., 376 U. S. 205 (1964) 19
Fry v. United States, 421 U. S. 542 (1975) 20
Fullilove v. Klutznick, No. 78-1007 (July 2, 1980) 17
Kentucky v. Dennison, 65 U. S. (24 How.) 66, (1861) 18
Minnesota Rate Cases, Simpson v. Shepard, 230 U. S. 352 (1912) 19
Monell v. Dept. of Social Services of N. Y., 436 U. S. 663, 677, 678 18
National League of Cities v. Usery, 426 U. S. 833 (1976) 13, 16-21, 23
Northern Securities Co. v. U. S., 191 U. S. 555 (1903) 16
Oklahoma v. Federal Energy Regulatory Commission, 494 F. Supp. 636 (W. D. Okla. 1980), appeal pending, Nos. 80-1748 and 80-1824 (10th Cir.) 19
Reeves, Inc. v. Stake, ... U. S. ....., 100 S. Ct. 2271 (1980) 22-23
Southern Bell T. & T. Co. v. MPSC, 237 Miss. 137, 113 So. 2d 622 (1959) 9
Stone v. Farmers Loan & Trust Co., 116 U. S. 307 (1885) 19
Veazie Bank v. Fenno, 75 U. S. (8 Wall.) 533 (1869) 22

CONSTITUTION, STATUTES AND REGULATIONS

United States Constitution:

Article I, Section 8, Clause 3 (Commerce Clause) 3, 12
Article IV, Section 4 ..... 12-13, 22
Article VI, Section 2 (Supremacy Clause) 13, 22
Fifth Amendment 4, 12, 22
Tenth Amendment 3, 13, 22
Fourteenth Amendment, Section 5 ..... 12, 17

Energy Supply and Environmental Coordination Act of 1974, Pub. L. 93-319, 88 Stat. 246:

15 U. S. C. (Supp. III) 797 ..... 9, 12

Federal Power Act (of 1920), 49 Stat. 863:

16 U. S. C. (Supp. III) 825m 15
16 U. S. C. (Supp. III) 825n 15
16 U. S. C. (Supp. III) 825o 15

Miss. Code Ann. (1972):

Sec. 77-3-33 10
Sec. 77-3-39 7
Sec. 77-3-59 8
Sec. 77-3-87 ..... 7, 12

Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 *et seq.* 2-9, 12-18, 20-23

Title I, 16 U. S. C. (Supp. III) 2601 *et seq.* 2, 11, 13, 14
Section 101, 16 U. S. C. (Supp. III) 2611 7
Section 111(a), 16 U. S. C. (Supp. III) 2621(a) 2, 9
Section 113(a), 16 U. S. C. (Supp. III) 2623(a) 2, 9
Section 114, 16 U. S. C. (Supp. III) 2624 7
Section 115(d), 16 U. S. C. (Supp. III) 2625(d) 8

Section 123, 16 U. S. C. (Supp. III) 2633 16
Section 133, 16 U. S. C. (Supp. III) 2643 .....9, 21
Title II, 16 U. S. C. (Supp. III) 796 *et seq.*:
Section 210, 16 U. S. C. (Supp. III) 824a-3 ..... 3, 9
Section 210(a), 16 U. S. C. (Supp. III) 824a-3(a) 3
Section 210(f), 16 U. S. C. (Supp. III) 824a-3(f) 15
Section 210(h), 16 U. S. C. (Supp. III) 824a-3(h)(2) 15
Title III, 15 U. S. C. (Supp. III) 3201 *et seq.* 2, 11, 13, 14
Section 303(a), 15 U. S. C. (Supp. III) 3203(a) 2
18 C. F. R.:
Section 292.305 10
44 Fed. Reg. 33869 (1979) 9
45 Fed. Reg. 12188 (1980) 9
U. S. Supreme Court Rule 16.1(c) 13

MISCELLANEOUS

Action Memorandum, DOE, Implementation Hearings, 96th Cong., 1st Sess., Ser. 96-61 (1979) 8
123 Cong. Rec.:
p. H. 8202 (daily ed. Aug. 1, 1977) 6
p. S. 16371 (daily ed. Oct. 5, 1977) 6
p. S. 16373 (daily ed. Oct. 5, 1977) 6
p. S. 14683 (daily ed. Oct. 6, 1977) 15
124 Cong. Rec. S. 17807 (daily ed. Oct. 9, 1978) 6
DOE Information Kit: The National Energy Act, DOE/OPA 0003 6
Energy Programs/Energy Markets, Energy Information Administration Gov. Printing office No. 061-003-0144 6

"FERC Notice of No Significant Impact," FERC Dkt. Nos. 79-54 and 79-55 6
FERC Order No. 69, FERC Dkt. RM-55 (Feb. 19, 1980) 10
H. R. Conf. Rep. No. 95-1750, 95th Cong., 2d Sess. (1978) 4, 9
Hart, 54 *Columbia Law Rev.* 514 (1954) 18
1 Priest, *Principles of Utility Regulation* 25 19

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MOTION TO AFFIRM

As one of the Appellees, the Mississippi Power & Light Company moves to affirm the final judgment of the U. S. District Court herein on the following ground:

It is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

References herein to the "Federal Energy Regulatory Commission" will be to "FERC"; to the "Mississippi Public Service Commission," to "MPSC"; and to "Mississippi Power & Light Company," to "MP&L."

Appendices to the Jurisdictional Statement herein include copies of documents which are appropriately before the Court in this form and will not be duplicated in this motion. They will be referred to herein as follows: Appellants' Appendix A, page 1a, will be referred to as "App. A, 1a."

This Appellee will also annex hereto certain appendices of its own, which will be referred to as "MP&L App. ....., ..."

References to the Jurisdictional Statement will be to "J. S., ..."

I QUESTIONS PRESENTED

Appellants' statement of the "question presented"[1] is incomplete and misleading.

A more accurate statement of the questions presented would be: Titles I and III of the Public Utility Regulatory Policies Act of 1978 ("PURPA") require the States, acting through their regulatory authorities and courts, to adopt certain rate design and regulatory standards, or, in effect, to show cause in writing, based on substantial evidence, why the same should not be adopted. This must be done within two years, or, if not within three years, then in the first rate case thereafter; and three federal policies or purposes "supplement otherwise applicable state law"[2] and expand the discretion of the State regulatory commissions; and overriding federal procedural rules and definitions cover every facet of the trial and appeal: discovery, intervention, fees, scope of issues, *amici curiae*,

1. J. S., 1.

2. 16 U. S. C. (Supp. III) Sections 2621(a) and 2623(a); and 15 U. S. C. (Supp. III) Section 3203(a).

time limitations and form of order. *Under threat of fine and penalties,* Section 210 of Title II of PURPA *requires the States,* acting through their regulatory commissions, to implement rules promulgated or revised by the Federal Energy Regulatory Commission under which regulated utilities must offer to sell electricity to and purchase electricity from qualifying cogenerator and small power production facilities at rates fixed as prescribed in such rules. PURPA imposes other mandatory duties on the State regulatory authorities and requires regulated electric utilities to furnish costly information, to pay the attorneys' and expert fees of consumers, and pay the heavy cost of compliance with PURPA, under threat of fines and penalties.

The questions presented are whether these statutory provisions:

(a) Are the regulation of "commerce," Art. I, Section 8, Cl. 3.

(b) Conscript the States and their officers to perform affirmative duties and otherwise implement federal policies, against their wishes, in violation of the Tenth Amendment.

(c) Impair the States' ability to function effectively in a federal system, by directly displacing the States' freedom to structure integral operations in areas of traditional government functions, as prohibited by the Tenth Amendment.

(d) Violate the guaranty of a republican form of government, by passing supplementary state law and interfering with the administration and enforcement of state law.

(e) Violate the Supremacy Clause by creating a supplementary state law which is, at once, federal-and-supreme and state-and-inferior.

(f) Deprive the regulated utilities of their property without due process of law in violation of the Fifth Amendment, by compelling compliance with an u. constitutional statute under threat of fines and penalties, and otherwise.

II CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions set forth by Appellants (App. D, 12a-67a), other pertinent provisions are set forth in MP&L App. A, 1a-14a.

III STATEMENT

A. The Statutory Background

Appellants broadly contend that "xxx conservation by electric utilities was *essential* xxx to lessen xxx dependency on foreign oil, xxx";[3] but Congress should not be allowed under the guise of an energy emergency to conscript State regulatory authorities to enforce federal policies, because PURPA is not aimed at conservation. (Emphasis is ours, unless noted.)

Congress refused to pass the House version of PURPA, which established national minimum rate standards and required the States to implement same under federal supervision and enforcement;[4] and instead passed the present version under which Appellants claim "xxx there is no *requirement* that any of the standards actually be adopted

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3. J. S., 2 and 3.

4. Joint Explanatory Statement of the Committee of Conference to accompany H. R. 4018, Cong. Rec., October 10, 1978, H. 12030 and H. 12031; House Conference Rep. No. 95-1750, 95th Cong., 2d Sess. (1978), p. 70; reprinted 1978 Cong. & Ad. News 7797 (hereinafter Conf. Rep. at .....).

or implemented,"[5] clear evidence that no emergency existed.

The congressional history of PURPA makes clear that there was no urgent deficiency in state utility regulation in the so-called "energy crisis," which demanded an immediate solution by the national government. Note that stated by Senator Johnston, one of the floor managers of S. 2114:

"The legislation originally proposed by the administration, Part E of S. 1469, contemplated a radical extension of Federal authority into the highly complex matter of the design of retail rates for electricity. These rates have been traditionally set at the State level, of ten [often] by persons elected for this purpose. Retail electric utility rate policy has in the past been shaped by a host of decisions arrived at on the local level, taking into account unique conditions of geography, climate, social and economic structure and the desire of the people of a State. Diverse character of rate structures in the various States in many respects reflects the diversity of the country.

"The administration bill proposed to establish Federal policies with respect to the methodology of rate-making and to super impose these policies on the decision making process at the State level. x x x

"The committee felt strongly, and the committee hearing record clearly showed, that at present there is no clear justification for such an extension of federal authority. At a later time, after more study and experimentation with alternative rate structures, it is conceivable that a case for enforcement of some sort of Federal standards could be made. But that case simply cannot be made based on the record available at this time."

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5. J. S., 3.

"Accordingly the committee has reported a bill to the Senate which adopts a far more cautious approach than that contained in either the administration or house bills."[6]

The final form of PURPA reflects that the House receded from its urgent approach and adopted a cautious approach like that reflected in S. 2114.

The congressional history reveals also an awareness that the entire national energy program would *not* offer any relief from rising utility bills;[7] and it was even pointed out that the energy "crisis" was only "xxx in the parts of the energy sector that are controlled by the Government."[8]

Even though Senator Jackson forecast a saving from the *entire* national energy program as "xxx about 3 million barrels of oil a day by 1985, give or take a few hundred thousand barrels,"[9] the Department of Energy has forecast the saving *from PURPA* by 1985 as from *zero* to 160,000 barrels of oil per day[10] and the FERC has forecast a saving from PURPA by 1985 of only 40,000 barrels of oil per day.[11]

Furthermore, the Department of Energy has stated that most of the federal energy programs (except the synthetic fuel corporation and the Energy Mobilization Board) "xxx will *together have only relatively small impacts on energy supply, consumption, and the average level*

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6. Cong. Rec., October 5, 1977, S. 16371.

7. *Ibid.*, Senator Jackson, October 5, 1977, S. 16373.

8. *Ibid.*, August 1, 1977, H. 8202.

9. *Ibid.*, October 9, 1978, S. 17807.

10. *DOE Information Kit: The National Energy Act*, DOE/OPA 0003, page III, "Import Savings."

11. "FERC Notice of Finding of No Significant Impact, etc.," Federal Energy Regulatory Commission, Dkt. Nos. RM 79-54 and RM 79-55.

of energy prices and oil imports in 1990."[12] *The issue is not the need for saving foreign oil, but the need for commandeering the States to enforce federal policies as a means of saving foreign oil.* Note that one of the purposes of PURPA, equitable rates, has nothing to do with saving oil;[13] nor does the requirement for a consideration of lifeline rates for residential customers.[14]

Appellants do not mention the statutory background of the State statutes supplemented and jeopardized by PURPA, under which the jurisdiction of the Mississippi Public Service Commission's jurisdiction over rate cases is limited to six months;[15] and under which the very heavy expense of compliance with PURPA substantially burdens the MPSC's budget and must be paid water, telephone and other utilities having no connection with PURPA.[16]

1. Titles I and III of PURPA

While it is true that PURPA does not require the adoption of these standards, Appellants admit that "xxx each of these standards is to be considered in a hearing xxx and a written statement of the reasons for declining to implement or adopt [them, must be issued by the State regulatory authority] xxx to be made available to the public."[17]

Under the law of Mississippi, such a statement is a finding which "xxx shall be supported by substantial *evidence* presented in the hearing and shall be in sufficient de-

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12. Energy Information Administration, *Energy Programs/ Energy Markets*, Gov. Printing Office No. 061-003-0144, Executive Summary, XVIII.

13. 16 U. S. C. (Supp. III) Section 2611 (3).

14. 16 U. S. C. (Supp. III) Section 2624.

15. Section 77-3-39, Miss. Code Ann. (1972).

16. Section 77-3-87, Miss. Code Ann. (1980).

17. J. S., 6.

tail to enable the court on appeal to determine the controverted questions presented by the proceeding, and the basis of the commission's conclusion."[18] Therefore, PURPA, in effect, requires the State regulatory authority to adopt these federal standards or to show cause by written finding, based on substantial evidence, for its failure to adopt the same.

Furthermore, PURPA requires the State regulatory authority in its hearings on the PURPA standards to exercise its discretionary judgment in accord with certain statutory definitions and tests which substantially affect and compel the outcome:

For instance, "separate metering *shall be determined appropriate* for any new building for purpose of section 113(b)(1) *if*-

"(1) there is more than one unit in such building,

"(2) the occupant of each such unit has control over a portion of the electric energy used in such unit, and

"(3) with respect to such portion of electric energy used in such unit, the long-run benefits to the electric consumers in such building exceed the costs of purchasing and installing separate meters in such building."[19]

In addition, the three unclearly defined[20] federal purposes of PURPA "x x x supplement otherwise applicable state law" both in the hearing before the commission and on

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18. Section 77-3-59, Miss. Code Ann. (1972).

19. 16 U. S. C. (Supp. III) Section 2625(d).

20. *Action Memorandum* of the Department of Energy, January 9, 1979, Hearings before the Subcommittee on Energy and Power of the House Committee on Interstate and Foreign Commerce on Implementation of the Public Utility Regulatory Policies Act of 1978, June 18 and 19, 1979, 96th Cong., 1st Sess., Serial No. 96-61, p. 559 (hereafter Implementation Rec. at ....).

appeal to the courts;[21] and "the intent is that where a x x x [commission] finds insufficient authority, pursuant to otherwise applicable State law, under which it may adopt a standard established in section 111; then these three purposes of the title provide such authority. In effect *the three purposes expand the discretion of the State regulatory authority* x x x to adopt the standards of section 111."[22]

PURPA requires regulated utilities to compile at great expense marginal cost information, which is regarded as essential to the carrying out of the regulatory scheme contemplated by PURPA but which is in addition to, and not related to the fully allocated cost of service information on which Mississippi law predicates the utility's rate of return.[23] Under threat of fine and penalty,[24] such regulated utilities as the Appellee, Mississippi Power & Light Company, must compile and furnish this information periodically to the FERC and State regulatory authority;[25] and all the expense of complying with PURPA falls on the retail customers of such utilities, exempting the wholesale customers.[26]

2. Section 210 of Title II of PURPA

Appellants state that "The Commission was x x x directed to adopt rules to assure that the rates involved in these sales and purchases are just and reasonable. x x x

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21. 16 U. S. C. (Supp. III) Sections 2621(a) and 2623(a), and 15 U. S. C. (Supp. III) Section 3202(a).

22. Conf. Rep. at H. 12033, Section 111.

23. See *Southern Bell Telephone & Telegraph Co. v. Mississippi Public Service Commission*, 237 Miss. 137, 113 So. 2d 622 (1959); *PURPA Guideline No. 2*, Department of Energy, 45 Fed. Register 12188, February 22, 1980, at p. 61.

24. 15 U. S. C. (Supp. III) Section 797.

25. 16 U. S. C. (Supp. III) Section 2643.

26. Section 290.104, *Final Regulations* of Federal Energy Regulatory Commission, June 18, 1979, 44 Fed. Register 33869.

With respect to sales from the utility to the cogenerator, Congress intended 'just and reasonable' to refer to traditional utility rate-making concepts. With regard to purchases by the utility from the cogenerator, Congress intended that the rates should be *just and reasonable to the customers of the utility* and *should not exceed the incremental cost of the utility* of generating the additional energy itself or purchasing it from another source. x x x"[27] Yet Sections 292.304 (b)(2) and (b)(4) of these Rules require the utilities to purchase at a rate that *"equals"* each utility's full "avoided cost," that is, its full incremental cost, as to facilities the construction of which was commenced on or after November 9, 1978.[28] Thereby, these Rules prohibit the States from allowing the other non-cogenerating customers of the regulated utility to share any of the benefits of these transactions: in effect subsidizing cogenerators at the expense of the other customers of the Mississippi Power & Light Company.

These Rules also require the Mississippi Power & Light Company to provide certain types of service which may be requested by qualifying facilities to supplement or back-up those facilities' own generation.[29] There is no Mississippi law requiring such service to be furnished to those who supply electricity to a utility and this federal statute, therefore, discriminates against, and penalizes the other customers of the Mississippi Power & Light Company, who must pay for this back-up service.

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27. J. S., 9, 10, fn. 15.

28. Order No. 69 of the Federal Energy Regulatory Commission, February 19, 1980, Docket RM 79-55.

29. Rules of Federal Energy Regulatory Commission, 18 CFR Section 292.305; *Cf.* Miss. Code Ann. (1972), Section 77-3-33, requiring public utilities to "furnish adequate, efficient and reasonable service xxx," obviously to those who purchase utility service from such utilities; the utilities being obligated to serve their customers but not their suppliers.

B. The Proceedings Below

On April 24, 1979, the State of Mississippi and the Mississippi Public Service Commission filed this action against the Secretary of Energy and the Federal Energy Regulatory Commission in the United States District Court for the Southern District of Mississippi, seeking a declaratory judgment that the Public Utility Regulatory Policies Act of 1978 was void and unconstitutional, especially attacking Titles I and III and Section 210, as an "attempt to coerce the Plaintiffs into adopting federal standards on rate making, employing State employees and expending substantial State funds to assist x x x in enforcing the federal policies therein set forth."[30] The Plaintiffs' Amended Complaint alleged that the Plaintiffs would be seriously harmed by PURPA because its enforcement would require the State of Mississippi, acting through the Mississippi Public Service Commission, either to adopt the federal standards or to show cause, in effect, based on substantial evidence why the same did not meet the federal tests and should not be adopted; to employ a substantial number of additional employees and to spend a substantial amount of state funds in order to implement federal policies which the Plaintiffs did not choose; and to comply with these federal policies as to how the essential decisions regarding the conduct of utility rate making and integral governmental functions in regard thereto are to be made; even though enforcement will vastly complicate and delay the activities of the Mississippi Public Service Commission in performing its duties of establishing retail electric and gas rates for the people of the State of Mississippi; will cost the electric and gas consumers of Mississippi a tremendous amount of money to pay for the implementation of these federal policies and the expensive bureaucratic

30. Amended Complaint, Count I, p. 8.

procedures required for this purpose; and will disrupt the ability of the Mississippi Public Service Commission to pay its expenses out of the utility tax allocated for that purpose, compelling the Plaintiffs to rely on voluntary grants from the United States for this purpose which may be suspended at any time and which may be used for purposes of coercion. These allegations were later proved.

Without objections from the other parties, the Mississippi Power & Light Company, an electric utility regulated under PURPA, was allowed to intervene and file its Intervenor's Complaint. Therein it substantially adopted the Plaintiff's Amended Complaint[31] and additionally alleged that enforcement of PURPA would wrongfully and unconstitutionally impose on MP&L the vast cost of obtaining very complex and extensive information as to the cost of service and furnishing same to the Federal Energy Regulatory and the Mississippi Public Service Commission, under penalties imposed by 15 U. S. C. (Supp. III) Section 797; and the cost of enforcing PURPA (through MP&L's payment of the tax supporting the Mississippi Public Service Commission, under Section 77-3-87, Miss. Code Ann. (1980)); and the cost of intervention and participation by Defendants and others in proceedings to enforce PURPA;[32] and that consideration of PURPA's federal standards would seriously aggravate the problem of regulatory lag in the fixation of MP&L's rates by the Mississippi Public Service Commission.[33]

MP&L alleged that "PURPA violates the due process clause of the Fifth and Fourteenth Amendments; Article I, Section 8, clause 3 ('The Commerce Clause'); Article IV,

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31. Intervenor's Complaint, p. 7, Paragraph III, p. 2; Paragraph IV, p. 2; Paragraph V, p. 3.

32. *Ibid.*, Paragraph IV-13, p. 2.

33. *Ibid.*, Paragraph IV-12, p. 2.

Section 4 (the 'Republican form of Government'); Article VI, Section 2 (the 'Supreme Law of the Land'); and the Tenth Amendment of the United States Constitution."[34] MP&L proved the huge cost burden PURPA put on its customers. All parties then filed motions for summary judgment and the District Court granted those filed by the Plaintiffs and MP&L, and overruled those filed by the Defendants.

The District Court initially held that PURPA was unconstitutional because "this Act simply does not even attempt to regulate commerce among the several States";[35] and because this Act interfered unduly with the State's performance of its sovereign functions and compelled the State to carry out the commands of the federal government, in violation of the holding in *National League of Cities v. Usery*.[36]

In its Final Judgment, the District Court explained its opinion as "xxx finding that Title I, Section 210 of Title II, and Title III of the Public Utility Regulatory Policies Act of 1978 xxx are unconstitutional and void in that they constitute a direct intrusion on integral and traditional functions of the State of Mississippi and violate the Constitution of the United States, especially the Tenth Amendment, the Supremacy Clause [Article VI, Section 2] and a republican form of government as guaranteed by Article IV, Section 4 xxx."[37]

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34. *Ibid.*, Paragraph V, Count Seven, pp. 3 and 4.
35. App. A, 7a.
36. *Ibid.*, at 5a-7a; 426 U. S. 833, 845, 852 (1976).
37. *Ibid.*, at 8a.

THE QUESTIONS ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT

The District Court has admittedly declared unconstitutional an Act of Congress but its decision was compelled by well settled law; and it is manifest from the prior decisions of this Court that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.[38]

Appellants begin by arguing, first, that PURPA is "imperative to combat the energy crisis"; and second, that "Congress enlisted the assistance of state regulatory authorities in this effort, but xxx was careful to preserve to the maximum extent possible the freedom of state authorities to make their own decisions in consideration of the regulatory standards established in Titles I and III and in the implementation of the Commission's cogeneration rules [under] xxx Section 210 xxx."[39]

These are the same arguments which the Appellants made below; and the District Court, having considered the evidence of the Appellants and the Appellees, and found "no genuine issue of material fact,"[40] ruled that "the United States does not have the power xxx to impose its three standards under PURPA [i.e., the three federal policy purposes set forth in 16 U. S. C. (Supp. III) Section 2611] upon the State of Mississippi *under the guise* of providing a solution to the nation's energy problems."[41]

We have hereinabove demonstrated the basis for the finding of the Court:[42] there is no urgent need to conscript

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38. Supreme Court Rule 16.1(c); *City of Boston v. Jackson*, 260 U. S. 309, 314 (1922).

39. J. S., 13.

40. App. A, 7a.

41. *Ibid.*, 7a.

42. *Supra*, pp. 4-7.

the States to enforce federal regulatory policy and the Defendants forecast no real oil saving to result from PURPA.

How then can Appellants have the temerity, with deference, to assert that "xxx if the xxx invalidation of PURPA's provisions is permitted to stand, it would deal *a severe blow* to congressional efforts to reduce this nation's dependence on foreign oil xxx."[43]

The second argument of Appellants that Congress "*enlisted* the assistance of the State regulatory authorities, xxx careful to preserve xxx [their] freedom xxx"[44] is equally disproven by the facts: Congress has *conscripted* or *drafted* the State regulatory authorities and judicial officers against their will; they have not voluntarily enlisted. Each State, acting through its regulatory authority, "*shall implement*" the rules for cogeneration and small power production prescribed or revised by FERC,[45] under threat of mandamus and injunction,[46] and forfeitures and penalties.[47] Note that enforcement lies "xxx against the State regulatory authority."[48]

Appellants claim that "the district court ignored Congress' keen sensitivity xxx to the principle of State sovereignity."[49] Yet even though the Senate initially rejected allowing the federal "energy czar" to appeal the disapproval of a federal standard by a State regulatory authority as "a blackjack xxx a hammer to coerce every utility regulatory commissioner in the country,"[50] the final version

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43. J. S., 13.

44. J. S., 13.

45. 16 U. S. C. (Supp. III) Section 824a-3(f); Section 210(f).

46. 16 U. S. C. (Supp. III) Section 825m.

47. *Ibid.*, Sections 825n and 825o.

48. *Ibid.*, Section 824a-3(h)(2); Section 210h(2).

49. J. S., 13.

50. Cong. Rec., Senator Durkin, as floor manager, October 6, 1977, S. 14683.

of PURPA empowered the Secretary of Energy not only to appeal but also to appear as *amicus curiae* as a matter of statutory right,[51] notwithstanding the violation thereby of the discretion of courts to determine who shall be allowed to appear as an *amicus curiae*.[52]

How can Appellants claim such sensitivity when the threat of fines, forfeitures and penalties hangs over the head of the elected officials of the MPSC and the utilities regulated by it?

With deference, we emphatically deny the contentions of Appellants that "the district court's ruling is incorrect"[53] for any of the reasons cited by Appellants. The prior decisions of this Court really left the District Court with only one possible decision: that PURPA is unconstitutional. We say this for the following reasons:

1. Appellants reiterate[54] the authorities and argument of Mr. Justice Brennan in his Dissenting Opinion in *National League of Cities v. Usery*,[55] to the effect that the Commerce Power extends to regulate intrastate activities substantially affecting interstate commerce or the regulation of which is necessary to federal regulation of interstate commerce; but Appellants do not mention Mr. Justice Brennan's recognition of "xxx the Court's function of limiting congressional exercise of its power to regulation

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51. 16 U. S. C. (Supp. III) Section 2633.

52. It is the right of the Chancery Court of Hinds County, Mississippi, the Supreme Court of Mississippi and this Court to deny permission to appear as an *amicus curiae*. *Northern Securities Company v. U. S.*, 191 U. S. 555 (1903); and see *Burnside v. Burnside*, 228 Miss. 180, 86 So.2d 333 (1956).

53. J. S., 14.

54. J. S., 14 and 15.

55. 426 U. S. 856, in which Mr. Justice White and Mr. Justice Marshall joined.

of 'commerce' "[56] and his declaration that "of course, regulations that this Court can say are not regulations of 'commerce' cannot stand, *Santa Cruz Packing Co. v. N. L. R. B.*, 303 U. S. 453, 466, 58 S. Ct. 656, 660, 82 L. ed. 954 (1938), and in this sense, '[t]he Court has ample power to prevent—. . . "the utter destruction of the State as a sovereign political entity." ' *Maryland v. Wirtz*, 392 U. S. 183, 196, 88 S. Ct. 2017, 2024, 20 L. ed. 2d 1020 (1968)."[57]

In short, PURPA attempts to regulate "governance of commerce" rather than "commerce"; to regulate "the power of the states over commerce," rather than "commerce."[58]

The supplementation of the state law (usually done by the Legislature) of Mississippi and the administration and enforcement of Mississippi's law for the regulation of the rates and operations of utilities (usually done by the MPSC) are state functions directly taken over by PURPA; and they are not "commerce."

2. Appellants argue that "Congress is entitled to a more thoroughgoing consideration xxx than it was afforded by the court below,"[59] but Appellants introduced their evidence below, and fully briefed and argued their case—and the District Court, after a full consideration, found PURPA

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56. 426 U. S., at 861, fn. 3.

57. 426 U. S., at 860.

58. *Brown v. Environmental Protection Agency*, 521 F. 2d 827, at 838 and 839 (9th Cir. 1975), vacated, 431 U. S. 99 (1977), reinstated in part, 566 F. 2d 665 (9th Cir. 1978); and *District of Columbia v. Train*, 521 F. 2d 971, at 989 (D. C. Cir. 1975), vacated, 431 U. S. 99 (1977), reinstated in part and remanded sub nom., *District of Columbia v. Costle*, 567 F. 2d 1091 (D. C. Cir. 1977).

59. J. S., 16, citing *Fullilove v. Klutznick*, No. 78-1007 (July 2, 1980), 100 S. Ct. 2758, 2773, which recognizes the limitation on the Commerce Power announced in *National League of Cities v. Usery*, 426 U. S. 833 (1976), but proceeds to explore the power of Congress under Section 5 of the Fourteenth Amendment, 96 S. Ct., at 2774.

to be unconstitutional in view of the established law that PURPA's regulation of the MPSC's regulation of intrastate utilities was not commerce and that PURPA interfered unduly with the State's performance of its sovereign functions of government, in reliance on the controlling decision in *National League of Cities v. Usery.*

Appellants do not mention the settled constitutional principle established by this Court and expressed by the District Court in these words:

"The sovereign state of Mississippi is not a robot, or lackey which may be shuttled back and forth to suit the whim and caprice of the federal government."[60] The decisions prohibiting Congress from imposing affirmative duties upon State officers—such as in attempted by Section 210 of PURPA—are clear. *Ex Parte Kentucky v. Dennison,* 65 U. S. (24 How.) 66, 110 (1861); *Monell v. Department of Social Services of the City of New York,* 436 U. S. 663, 677, 678; Hart, "The Relation Between State and Federal Law," 54 *Columbia Law Review* 514-515 (1954); *Brown v. Environmental Protection Agency, supra,* fn. 58.

This principle is also reflected in *District of Columbia v. Train,* 521 F. 2d 971, at 992 (D. C. Cir. 1975), vacated, 431 U. S. 99, reinstated in part and remanded sub nom. *District of Columbia v. Costle,* 567 F.2d 1091 (D.C. Cir. 1977):

"In essence, the Administrator is here attempting to commandeer the regulatory powers of the states, along with their personnel and resources, for use in administering and enforcing a federal regulatory program against the owners of motor vehicles. The situation is not too dissimilar from one that would have existed during Pro-

60. App. A, 4a-7a; *National League of Cities v. Usery,* 426 U. S. 833 (1976).

hibition if the Federal Government had sought to compel police officers in a wet state to enforce the federal laws on that subject. Under the regulations here, the states are to function merely as departments of the EPA, following EPA guidelines and subject to federal penalties if they refuse to comply or if their regulation of vehicles is ineffective."

Appellants do not mention these underlying principles but proceed to try to distinguish *National League of Cities v. Usery*, 426 U. S. 833 (1976), on the ground that "the regulation of public utilities is not analogous to the traditional state functions described in *Usery* xxx".[61] But *Usery* held that "xxx such areas as fire prevention, xxx parks and recreation xxx are typical of those performed by state and local governments *in discharging their dual functions of administering the public law and* furnishing public services," 426 U. S. at 851. Obviously, the state government is discharging one of its "dual functions" in "administering the public law" through the State regulatory authority; and the regulation of intrastate utilities is a traditional function of state government. *The Minnesota Rate Cases, Simpson v. Shepard*, 230 U. S. 352 (1912); *Stone v. Farmers Loan & Trust Company*, 116 U. S. 307 (1885) (as to the predecessor of the MPSC); *Oklahoma v. Federal Energy Regulatory Commission*, 494 F. Supp. 636, 659 (W. D. Okla. 1980), appeal pending, Nos. 80-1748 and 80-1824 (10th Cir.), and see 1 Priest, *Principles of Public Utility Regulation*, Chapter 2, beginning p. 25.

We do not question the right of Congress to regulate intrastate utilities *through federal agencies* in accord with such decisions as *FPC v. Southern California Edison Co.*, 376 U. S. 205;[62] but not through non-consenting state agencies.

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61. J. S., 17.
62. J. S., 17.

We construe *Usery* as imposing a double rule: first, federal statutes directly displacing state choices in areas of integral governmental functions exceed the Commerce Power of Congress (426 U. S. at 852 and 855); and second, even if the federal statutory interference with integral state functions does not go to the extent of dictating state choices, the federal statute is unconstitutional unless the distinctions applied to *Fry v. United States*, 421 U. S. 542 (1975), exist (426 U. S. at 852 and 853). Note that this Court in *Usery* did not even mention using the *Fry* distinctions until it had found that the federal interference in *Usery* exceeded the Commerce Power and Mr. Justice Rehnquist clearly took up *Fry* as "one final matter" (*Id.* at 852).

We submit that the *Fry* distinctions are clearly absent in this case: although PURPA may have been occasioned by a concern over dependence on foreign oil, there was no extremely serious problem in state utility regulation which endangered the Nation and which could only be forestalled by collective action by the National Government, as demonstrated hereinabove, pp. 4-7; the means selected "xxx interfere with the States' freedom [well] beyond a very limited specific period of time" (*Id.* at 853), since the duty to report is for 10 years and many of the other duties—including implementing FERC's rules under Section 210—are unlimited, for an unspecified time; and PURPA will seriously burden the budget of the MPSC and interfere with its performance of its state functions.

But, even if the balancing test of Mr. Justice Blackmun is followed (*Id.* at 856): the federal interest in saving *zero* barrels of oil, with "only relatively small impacts on xxx oil imports in 1990,"[63] is not demonstrably

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63. Fn. 10 and fn. 12, *supra*.

greater than the interest of the states in preserving their ability to administer state laws as to utility operations and rates; nor is "xxx state compliance with imposed federal xxx standards *essential* xxx" (*Id.* at 856), because Congress "xxx found no clear justification for such an extension of federal authority [as to mandatorily require state compliance] xxx."[64] Whatever oil savings may justify the rest of the national energy program, no such saving justifies PURPA.

How can this entirely speculative oil saving from PURPA justify charging the retail electric and gas consumers—and even the retail water and telephone consumers in Mississippi (who must support the MPSC)—with the tremendous cost of the MPSC's compliance with PURPA? In addition, the retail electric consumers will be charged with the substantial cost of acquiring the equipment and personnel necessary for complying with Section 133;[65] and furnishing the information thereby required "xxx will require a massive 3 year data-gathering effort, the cost of which may outweigh the benefits to customers served by all but the largest utilities."[66]

We believe that all the Appellees are vitally interested in protecting the retail utility consumers of Mississippi from needlessly spending hundreds of thousands of dollars for an obviously unconstitutional federal program; we know that is the reason why the Mississippi Power & Light Company intervened.

3. Appellants brush aside that the District Court's decision was predicated in part upon PURPA's violation of

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64. *Supra*, p. 5.

65. 16 U. S. C. (Supp. III) Section 2643.

66. Dr. Kevin A. Kelly, Associate Director of the National Association of Regulatory Commissioners, *Implementation Rec.* at 174.

the guarantee of a republican form of government, Article IV, Section 4, of the U. S. Constitution. PURPA uniquely purports to "xxx supplement otherwise applicable state law";[67] and thereby violates the rights of the people of Mississippi to pass their own laws in their own legislature. *Duncan v. McCall*, 139 U. S. 449, 461 (1891); see also *Veazie Bank v. Fenno*, 75 U. S. (8 Wall.) 533, 547 (Tenth Amendment) (1869).

4. Appellants also brush aside that the District Court's decision is also safely predicated upon the Supremacy Clause, Article VI, Section 2, of the U. S. Constitution: it is logically and constitutionally impossible for a law to be, at one and the same time, both federal-and-supreme, and state-and-inferior. Yet that is what PURPA purports to be.

5. Appellants do not mention that MP&L will be deprived of its property without due process, in violation of the Fifth Amendment of the U. S. Constitution, if it is compelled by threat of fine and penalty, and otherwise to comply with an unconstitutional statute like PURPA.

CONCLUSION

The legal issues presented by this case have been completely resolved by this Court and the District Court's decision was eminently correct.

There simply can be no dispute with the decision of the District Court that "xxx Congress had no power xxx to regulate anything which is not commerce xxx";[68] and that the administration and enforcement of state laws by the MPSC are not "commerce." As held in *Reeves, Inc. v.*

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67. Fn. 2, *supra*.

68. App. A, 4a.

Stake, ... U. S. ....., 100 S. Ct. 2271, at 2277 (1980): "xxx the Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national market place."

And Mr. Justice Brennan, in his Dissenting Opinion in *Usery*, recognizes that "certainly the paradigm of soverign action— action *qua State*—is the enactment and enforcement of state laws."[69] PURPA both enacts and enforces state laws and supplementary state laws; and on its face is plainly void.

It is, therefore, manifest that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument and this cause should be affirmed. Probable jurisdiction should *not* be noted.

Respectfully submitted,

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69. 426 U. S. at 875.

APPENDIX

MP&L APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Constitution of the United States provides in pertinent part:

(a) Article I, Section 8:

> The Congress shall have Power * * *
>
> * * *
>
> To regulate Commerce * * * among the several States * * *
>
> * * *
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

(b) Article IV, Section 4:

> The United States shall guarantee to every State * * * a Republican Form of Government * * *.

(c) Article VI, Clause 2:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land * * *.

(d) Fifth Amendment:

> No person shall * * * be deprived of life, liberty, or property without due process of law * * *.

(e) Tenth Amendment:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

2. In addition to the portions of the Public Utilities Regulatory Policies Act of 1978 (Pub. L. No. 95-617, 92 Stat. 3117 *et seq.*), quoted by the Appellants, the following federal statutes are pertinent:

(a) 16 U.S.C. (Supp. III) Section 824a-3:

SEC. 210. COGENERATION AND SMALL POWER PRODUCTION.

(a) COGENERATION AND SMALL POWER PRODUCTION RULES.—Not later than 1 year after the date of enactment of this Act, the Commission shall prescribe, and from time to time thereafter revise, such rules as it determines necessary to encourage cogeneration and small power production which rules require electric utilities to offer to—

> (1) sell electric energy to qualifying cogeneration facilities and qualifying small power production facilities and
>
> (2) purchase electric energy from such facilities.

Such rules shall be prescribed, after consultation with representatives of Federal and State regulatory agencies having ratemaking authority for electric utilities, and after public notice and a reasonable opportunity for interested persons (including State and Federal agencies) to submit oral as well as written data, views, and arguments. Such rules shall include provisions

respecting minimum reliability of qualifying cogeneration facilities and qualifying small power production facilities (including reliability of such facilities during emergencies) and rules respecting reliability of electric energy service to be available to such facilities from electric utilities during emergencies. Such rules may not authorize a qualifying cogeneration facility or qualifying small power production facility to make any sale for purposes other than resale.

(b) RATES FOR PURCHASES BY ELECTRIC UTILITIES. —The rules prescribed under subsection (a) shall insure that, in requiring any electric utility to offer to purchase electric energy from any qualifying cogeneration facility or qualifying small power production facility, the rates for such purchase—

(1) shall be just and reasonable to the electric consumers of the electric utility and in the public interest, and

(2) shall not discriminate against qualifying cogenerators or qualifying small power producers.

No such rule prescribed under subsection (a) shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy.

(c) RATES FOR SALES BY UTILITIES.—The rules prescribed under subsection (a) shall insure that, in requiring any electric utility to offer to sell electric energy to any qualifying cogeneration facility or qualifying small power production facility, the rates for such sale—

(1) shall be just and reasonable and in the public interest, and

(2) shall not discriminate against the qualifying cogenerators or qualifying small power producers.

(d) DEFINITIONS.—For purposes of this section, the term "incremental cost of alternative electric energy" means, with respect to electric energy purchased from a qualifying cogenerator or qualifying small power producer, the cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source.

(e) EXEMPTIONS.—(1) Not later than 1 year after the date of enactment of this Act and from time to time thereafter, the Commission shall, after consultation with representatives of State regulatory authorities, electric utilities, owners of cogeneration facilities and owners of small power production facilities, and after public notice * * *, prescribe rules under which qualifying cogeneration facilities and qualifying small power production facilities are exempted in whole or part from the Federal Power Act, from the Public Utility Holding Company Act, from State laws and regulations respecting the rates, or respecting the financial or organizational regulation, of electric utilities, or from any combination of the foregoing, if the Commission determines such exemption is necessary to encourage cogeneration and small power production.

* * *

(f) IMPLEMENTATION OF RULES FOR QUALIFYING COGENERATION AND QUALIFYING SMALL POWER PRODUCTION FACILITIES.—(1) Beginning on or before the date one year after any rule is prescribed by the Commission under subsection (a) or revised under such subsection,

each State regulatory authority shall, after notice and opportunity for public hearing, *implement such rule (or revised rule)* for each electric utility for which it has ratemaking authority.

* * *

(g) JUDICIAL REVIEW AND ENFORCEMENT.—(1) Judicial review may be obtained respecting any proceeding conducted by a State regulatory authority or nonregulated electric utility for purposes of implementing any requirement of a rule under subsection (a) in the same manner, and under the same requirements, as judicial review may be obtained under section 123 in the case of a proceeding to which section 123 applies.

(2) Any person (including the Secretary) may bring an action against any electric utility, qualifying small power producer, or qualifying cogenerator to enforce any requirement established by a State regulatory authority or nonregulated electric utility pursuant to subsection (f). Any such action shall be brought only in the manner, and under the requirements, as provided under section 123 with respect to an action to which section 123 applies.

(h) COMMISSION ENFORCEMENT.—(1) For purposes of enforcement of any rule prescribed by the Commission under subsection (a) with respect to any operations of an electric utility, a qualifying cogeneration facility or a qualifying small power production facility which are subject to the jurisdiction of the Commission under part II of the Federal Power Act, such rule shall be treated as a rule under the Federal Power Act. Nothing in subsection (g) shall apply to so much of the operations of an electric utility, a qualifying

cogeneration facility or a qualifying small power production facility as are subject to the jurisdiction of the Commission under part II of the Federal Power Act.

(2)(A) The Commission may enforce the requirements of subsection (f) against any State regulatory authority or nonregulated electric utility. For purposes of any such enforcement, the requirements of subsection (f)(1) shall be treated as a rule enforceable under the Federal Power Act. *For purposes of any such action, a State regulatory authority or nonregulated electric utility shall be treated as a person within the meaning of the Federal Power Act.* No enforcement action may be brought by the Commission under this section other than—

(i) an action against the State regulatory authority or nonregulated electric utility for failure to comply with the requirements of subsection (f) or

(ii) an action under paragraph (1).

(B) Any electric utility, qualifying cogenerator, or qualifying small power producer may petition the Commission to enforce the requirements of subsection (f) as provided in subparagraph (A) of this paragraph. If the Commission does not initiate an enforcement action under subparagraph (A) against a State regulatory authority or nonregulated electric utility within 60 days following the date on which a petition is filed under this subparagraph with respect to such authority, the petitioner may bring an action in the appropriate United States district court to require such State regulatory authority or nonregulated electric utility to comply with such requirements, and such court may issue such injunctive or other relief as may be appro-

priate. The Commission may intervene as a matter of right in any such action.

* * *

(b) 16 U.S.C. (Supp. III) Section 825m:

§ 825m. Restraining violations; mandamus to compel compliance with law; employment of attorneys

(a) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper District Court of the United States, the United States District Court for the District of Columbia, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings under this chapter.

(b) Upon application of the Commission the district courts of the United States, the United States District Court for the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of

this chapter or any rule, regulation, or order of the Commission thereunder.

(c) The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission or its members in the conduct of their work, or for proper representation of the public interests in investigations made by it or cases or proceedings pending before it, whether at the Commission's own instance or upon complaint, or to appear for or represent the Commission in any case in court; and the expenses of such employment shall be paid out of the appropriation for the Commission.

June 10, 1920, c. 285, § 314, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 861, and amended June 25, 1936, c. 804, 49 Stat. 1921; June 25, 1948, c. 646, § 32(b), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107.

(c) 16 U.S.C. (Supp. III) 825n:

§ 825n. Forfeiture for violations; recovery

(a) Any licensee or public utility which willfully fails, within the time prescribed by the Commission, to comply with any order of the Commission, to file any report required under this chapter or any rule or regulation of the Commission thereunder, to submit any information or document required by the Commission in the course of an investigation conducted under this chapter, or to appear by an officer or agent at any hearing or investigation in response to a subpoena issued under this chapter, shall forfeit to the United States an amount not exceeding $1,000 to be fixed by the Commission after notice and opportunity for hearing. The imposition or payment of any such forfeiture shall not bar or affect any penalty pre-

scribed in this chapter but such forfeiture shall be in addition to any such penalty.

(b) The forfeitures provided for in this chapter shall be payable into the Treasury of the United States and shall be recoverable in a civil suit in the name of the United States, brought in the district where the person is an inhabitant or has his principal place of business, or if a licensee or public utlity, in any district in which such licensee or public utility transacts business. It shall be the duty of the various United States attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures under this chapter. The costs and expenses of such prosecution shall be paid from the appropriations for the expenses of the courts of the United States.

June 10, 1920, c. 285, § 315, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 861, and amended June 25, 1948, c. 646, § 1, 62 Stat. 909.

(d) 16 U.S.C. (Supp. III) Section 825o:

§ 825o. Penalties.

(a) Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished by a fine of not more than $5,000 or by imprisonment for not more than two years, or both.

(b) Any person who willfully and knowingly violates any rule, regulation, restriction, condition, or or-

der made or imposed by the Commission under authority of this chapter, or any rule or regulation imposed by the Secretary of the Army under authority of subchapter I of this chapter shall, in addition to any other penalties provided by law, be punished upon conviction thereof by a fine of not exceeding $500 for each and every day during which such offense occurs.

June 10, 1920, c. 285, § 316, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 862.

(e) 16 U.S.C. (Supp. III) Section 791a:

§ 791a. Short title

This chapter may be cited as the "Federal Power Act."

June 10, 1920, c. 285, § 320, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 863.

(f) 15 U.S.C. (Supp. III) Section 797 (which is made applicable by 16 U.S.C. (Supp. III) Section 2643(d)

§ 797. Enforcement

(a) It shall be unlawful for any person to violate any provision of section 792 of this title (relating to coal conversion and allocation) or section 796 of this title (relating to energy information) or to violate any rule, regulation, or order issued pursuant to any such provision.

(b)(1) Whoever violates any provision of subsection (a) of this section shall be subject to a civil penalty of not more than $2,500 for each violation.

(2) Whoever willfully violates any provision of subsection (a) of this section shall be fined not more than $5,000 for each violation.

(3) It shall be unlawful for any person to offer for sale or distribute in commerce any coal in violation of an order or regulation issued pursuant to section 792(d) of this title. Any person who knowingly and willfully violates this paragraph after having been subjected to a civil penalty for a prior violation of the same provision of any order or regulation issued pursuant to section 792(d) of this title shall be fined not more than $50,000, or imprisoned not more than six months, or both.

(4) Whenever it appears to the Federal Energy Administrator or any person authorized by the Federal Energy Administrator to exercise authority under section 792 of this title or section 796 of this title that any individual or organization has engaged, is engaged, or is about to engage in acts or practices constituting a violation of subsection (a) of this section the Federal Energy Administrator or such person may request the Attorney General to bring a civil action to enjoin such acts or practices, and upon a proper showing, a temporary restraining order or a preliminary or permanent injunction shall be granted without bond. In such action, the court may also issue mandatory injunctions commanding any person to comply with any provision, the violation of which is prohibited by subsection (a) of this section.

(5) Any person suffering legal wrong because of any act or practice arising out of any violation of subsection (a) of this section may bring a civil action for appropriate relief, including an action for a declaratory judgment or writ of injunction. United States district courts shall have jurisdiction of actions under this paragraph without regard to the amount in con-

troversy. Nothing in this paragraph shall authorize any person to recover damages.

Pub.L. 93-319, § 12, June 22, 1974, 88 Stat. 264.

3. Pertinent Statutes of Mississippi, as set forth in the Mississippi Code Annotated (1972) are:

(a) Section 77-3-3:

§ 77-3-3. Definitions.

As used in this article:

* * *

(d) The term "public utility" includes persons and corporations, * * * operating in this state equipment or facilities for:

(1) The generation, manufacture, transmission or distribution of electricity to or for the public for compensation;

(2) The transmission, sale, sale for resale, or distribution of natural, artificial, or mixed natural and artificial gas to the public for compensation by means of transportation, transmission, or distribution facilities and equipment located within this state; * * *;

(3) The transmission, conveyance or reception of any message over wire, or by radio, * * * to the public for compensation, * * *;

* * *

(4) The transmission, distribution, sale or resale of water to the public for compensation, or * * * operating a sewage disposal service, to or for the public for compensation.

* * *

(b) Section 77-3-5:

§ 77-3-5. Jurisdiction and powers of commission.

Subject to the limitations imposed in this article and in accordance with the provisions hereof, the public service commission shall have exclusive original jurisdiction over the intrastate business and property of public utilities. However, the commission shall not have jurisdiction over the production and gathering of natural gas or the sale of natural gas in or within the vicinity of the field where produced, * * *.

(c) Section 77-3-39:

§ 77-3-39. Hearing on rate change; suspension of proposed rates.

Whenever there is filed with the commission by any public utility any schedule or notice stating a rate or rates differing from the rate or rates theretofore in effect the commission may, either upon complaint or upon its own initiative, upon reasonable notice, enter upon a hearing concerning the lawfulness of such rate or rates.

Pending such hearing and the decision thereon the commission, upon delivering to the utility affected thereby a statement in writing of its reasons therefor, may, at any time before they become effective, suspend the operation of such rate or rates, but not for a longer period than ninety days beyond the time when such rate or rates would otherwise go into effect. However, if the commission shall find that a longer time will be required for its determinations, the commission may extend the period for not to exceed six months from the date of filing such schedule or notice. Notwithstanding any such order of suspension, the pub-

lic utility may put such suspended rate or rates into effect on the date when it or they would have become effective if not so suspended, by filing with the commission a bond in a reasonable amount approved by the commission, with sureties approved by the commission, conditioned upon the refund, in a manner and to the parties to be prescribed by order of the commission, of the amount of the excess, with lawful interest thereon, if the rate or rates so put into effect are finally determined to be excessive . . .